No. 539

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IN THE

Supreme Court of the United States

IN THE MATTER

—OF—

MANHATTAN STEAM BAKERY, INC.,
Bankrupt,

IRVING J. WHITE, appearing specially,
Petitioner,

IRVING STEINMAN, as Trustee, NATHAN PEARLSTEIN and MANHATTAN BAKERIES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN ITS SUPPORT.

JOHN P. MCGRATH,
Counsel for Appellant,
appearing specially.

ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

IN THE MATTER

—OF—

MANHATTAN STEAM BAKERY, INC.,
Bankrupt.

IRVING J. WHITE, appearing specially,
Petitioner,

IRVING STEINMAN, as Trustee, NATHAN PEARLSTEIN and MANHATTAN BAKERIES, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, IRVING J. WHITE, appearing specially for the purposes herein set forth, represents:

I. That the United States Circuit Court of Appeals for the Second Circuit, on June 9, 1941, unanimously affirmed an order of the United States District Court for the Eastern District of New York, made by the Honorable Grover M. Moscowitz, District Judge, confirming the report of a Referee in Bankruptcy.

II. That said order of the District Court held null and void a written contract entered into between your petitioner

and the bankrupt, Manhattan Steam Baker, Inc., on April 26th, 1937, pursuant to which your petitioner installed in bankrupt's premises, bakers' machinery of the contract price of $12,150.00 upon which $9,400.00 with interest from September 1, 1937, remains unpaid and under which contract the bankrupt had been in default since September, 1937.

III. Pursuant to notice, the written offer (both set forth as to material parts in the appendix) of Nathan Pearlstein to purchase all of bankrupt's assets subject to various encumbrances, was accepted at a creditors' meeting.

It must be noted that

> "* * * subject to * * * conditional bills of sale and foreclosure 'proceedings thereof * * *'"

in both the offer and notice of sale refer to petitioner's contract and its pending foreclosure, that being the only one under foreclosure and the only one existing beside one on bankrupt's trucks, which was neither in default nor under foreclosure and upon which only a nominal balance remained unpaid.

Thereupon, and *before* the order confirming the sale was made, petitioner applied to the District Court to so modify its existing stay as to permit him to proceed in his pending State Court foreclosure, but before the application came on for argument, the order confirming the sale was entered, and therefore, when the motion came before the District Court to be heard, petitioner asked leave to withdraw his said application, since by the entry of the order of confirmation, said sale became final, the purchaser possessed of the chattels in question and the possession of the District Court terminated.

By the judicial confirmation of the sale, the District Court voluntarily and finally parted with possession of the *res* and was without further power or jurisdiction to grant any relief to petitioner. *Then* he was compelled to and did institute a new suit in the State Court against said Pearl-

stein (who was a mere dummy) and his transferee, the new corporation Manhattan Bakeries, Inc., for the replevin of his chattels.

However, notwithstanding the sale subject to petitioner's contract and the foreclosure thereof, and the judicial confirmation of such sale, the District Court denied petitioner leave to withdraw and referred the matter to the Referee in Bankruptcy in charge of the proceeding to hear and report.

Appearing specially and, at every stage, protesting the lack of jurisdiction, petitioner was compelled to oppose the trustee's petition to have said contract declared null and void for the alleged reason that the same had been prematurely refiled. The New York State Personal Property Law (the material portions of which are found in the appendix) requires refiling "within thirty days next preceding the expiration of "each period" while petitioner's contract was actually refiled forty-five days before three years had expired from its original filing. No order was made, before (or after) the sale, either permitting a sale of bankrupt's assets free and clear of liens or preserving to the trustee any claim or lien of any kind and the sale was actually made expressly subject to petitioner's contract as shown by excerpts from the minutes of the creditors' meeting of June 19, 1940, hereinafter quoted.

The trustee made no effort to prevent transfer or encumbrance of the chattels, but petitioner, by temporary stays obtained in his State Court action and finally by actual replevin, safeguarded the property. On August 24, 1940, the Sheriff of Queens County levied replevin on the chattels against said Nathan Pearlstein and Manhattan Bakeries, Inc., the new corporation now in actual, physical possession and ever since the said Sheriff has had constructive possession, under the due process of the State Court, in which action petitioner provided the statutory bond of $12,000. Not until this time, when the free use of this expensive equipment by Manhattan Bakeries, Inc., was about to be terminated, did the Trustee take any steps to safeguard the prop-

erty, and then he obtained a stay against actual removal of the machinery in the Federal Court against petitioner and said Sheriff, insuring to this new corporation the continued free use thereof.

IV. The assignment of errors filed below on behalf of petitioner presented, among others, the following questions which were argued before the Circuit Court of Appeals:

(a) That said District Court had jurisdiction neither of the person of your petitioner nor of the property involved in this proceeding and that the same is in contravention of Article V in Addition to, and Amendment of, the Constitution of the United States of America, in that your petitioner was thereby deprived of property, without due process of law.

(b) That the order of the District Court was against the conceded facts and against the law.

(c) That the order confirming said bankruptcy sale was a legal adjudication of the validity of petitioner's contract and that the District Court voluntarily surrendered its possession of, and jurisdiction over, said personal property prior to petitioner's application to withdraw from said District Court, and that the State Supreme Court, by its Sheriff, has possession and sole jurisdiction in the premises.

(d) That, in any event, bankrupt had no leviable interest in the property which the trustee could acquire, which raised the question as to whether or not the so-called Chandler Act (amendment of the Bankruptcy Act of 1938), was retroactive in respect to petitioner's contract.

(e) That the bankruptcy sale was made expressly subject to petitioner's contract and pending foreclosure thereof, without reservation.

V. The concurring opinion (in its substance *dissenting*) indicates the infirmity of the affirming decision below, *i. e.*,

"* * * It seems to me a constrained construction of the contract of sale to Pearlstein to hold that it meant a purchase subject to an *invalid* lien or claim. If that were all, the dispute here would be between the conditional vendor and the purchaser as present owner and beyond the bankruptcy jurisdiction. But the sale contract could be held on the evidence to be the product of mutual mistake, * * *"

But, there was no special proceeding or legal action to reform the sale or to correct any mistake, mutual or otherwise. Certainly, mistake, if any, was one of law, not of a fact and anything but mutual.

Unlike chattels mortgages, conditional contracts create questions of *title* not of *lien*. Here can be no question of *lien* though the opinions all speak of a "lien" or an *invalid* lien retained by the trustee or "an interest in the chattels equivalent thereto".

White has no *lien;* he has *title*. The purchaser bought expressly subject to White's *title*, the right to pay the balance and thus to acquire title. There is no equity of redemption since less than 50% had been paid so the purchaser acquired none but merely the right to pay the balance and make good the default. He did not *assume* the contract but took subject to it and "foreclosure thereof" pending at and before bankruptcy.

The Trustee sold all his *title;* there is not and never was a *lien*. If White's contract were, in fact, invalid, the reservation of *title* would be invalid. What has the Trustee now to sell? A purely fictitious *lien?* What can a prospective purchaser now acquire from the Trustee? What rights, if any, has he against the original purchaser who has already acquired the Trustee's *title*, subject *not* to any lien but to White's *title?*

It is the bankrupt's estate that is to be administered here; not White's estate.

QUESTIONS PRESENTED.

A. Did the District Court have jurisdiction of the person of petitioner or of the *res*, concededly in the constructive possession of the State Court, by its Sheriff?

B. Is the Trustee a creditor who acquired "by attachment or levy a lien" on the *res*, as defined in the New York Personal Property Law (Sec. 65) and is the Chandler Act amending the Bankruptcy Act retroactive in this respect?

C. Is there legal authority for subrogation of the Trustee to petitioner's contracts rights in this case and, if so, may it be had by way of this summary proceeding?

D. Had the bankrupt any leviable interest in the *res* which the Trustee could acquire?

E. Could the sufficiency of the refiling of petitioner's contract be questioned by the Trustee after the sale and without showing the existence of a creditor without actual notice thereof, and was it, in fact, sufficient?

F. Was the order confirming the bankruptcy sale *res adjudicata* as to the validity of petitioner's contract?

G. Was the bankruptcy sale made expressly subject to White's contract and its pending foreclosure, without reservation of any claims on behalf of the bankrupt estate?

VI. The following are the questions presented for review by this Court:

1. Did the District Court have jurisdiction of either the petitioner or the property in question in making its adjudication?

2. Is the 1938 amendment of the Chandler Act (Section 70 (c) U. S. C. A., Title 11, Sec. 110 (c)) referring to

creditors then (at bankruptcy) holding a lien, retroactive in so far as said amendment adds the words: "whether or not such creditor actually exists"?

3. Is the trustee here such a creditor as acquired "by attachment or levy a lien" in the absence of proof on his behalf, that at least one such creditor actually exists?

4. In the circumstances of this case is a summary proceeding "in bankruptcy" authorized by law?

5. Had the bankrupt, on filing of the bankruptcy petition, any leviable interest in the *res* under New York law?

6. Is the order confirming the bankruptcy sale *res adjudicata* as to the validity of petitioner's contract?

7. May the sufficiency of the refiling of petitioner's contract be questioned in this proceeding and, if so, was such refiling sufficient under the law of the State of New York?

REASONS FOR GRANTING THE WRIT.

VII. Your petitioner respectfully urges that, as shown above (and as will more fully be urged in the brief submitted herewith), the Circuit Court of Appeals in this cause has rendered a decision in conflict with applicable decisions of this Court and with the decision of another Circuit Court of Appeals on the same matter; has decided an important question of constitutional law in conflict with the weight of authority; has improperly given the Chandler Act retroactive effect in conflict with *Ginsberg* v. *Lindel*, 107 F. (2) 721, C. C. A. 8, and erroneously determined the questions as to jurisdiction and burden of proof and that the order of affirmance presented for review has so far departed from the

accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision.

WHEREFORE petitioner, appearing specially herein as heretofore, prays that a writ of certiorari may issue out of and under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein and that the order of the said Circuit Court of Appeals affirming the order of the District Court in this cause may be reversed and that the petitioner may have such other, further or different incidental relief as may be just in the premises.

Dated, July 21st, 1941.

IRVING J. WHITE,
Petitioner.

By
JOHN P. MCGRATH,
Counsel for Petitioner.

AFFIDAVIT OF IRVING J. WHITE.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK,

STATE OF NEW YORK; COUNTY OF NEW YORK.

IN THE MATTER

—OF—

MANHATTAN STEAM BAKERY, INC.,
Bankrupt.

IRVING J. WHITE, appearing specially,
Petitioner,

IRVING STEINMAN, as Trustee, NATHAN PEARLSTEIN and MANHATTAN BAKERIES, INC.,
Respondents.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

IRVING J. WHITE, being duly sworn, says:

I am the petitioner appearing specially herein. I have read the foregoing petition by me subscribed and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

IRVING J. WHITE.

Sworn to before me this
21st day of July, 1941.

ALMA WHITE,
Notary Public,
New York County, No. 156,
My commission expires March 31, 1942.

(Notarial Seal)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that, in my opinion, it is well founded and the cause is one in which the petition should be granted.

Dated, July 21st, 1941.

JOHN P. McGRATH.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

IN THE MATTER

—OF—

MANHATTAN STEAM BAKERY, INC.,
Bankrupt.

IRVING J. WHITE, appearing specially,
Petitioner,

IRVING STEINMAN, as Trustee, NATHAN PEARLSTEIN and MANHATTAN BAKERIES, INC.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT.

Some of the essential facts have been stated in the petition but an adequate statement would unduly prolong this brief. The affirmance of the order of the District Court was unanimous and two opinions were rendered (not yet reported) which are included in the return.

JURISDICTION.

The decisions affirming the order of the District Court were handed down on June 9th, 1941. The jurisdiction of this Court is invoked under the provisions of the Judicial Code (as amended), particularly Sections 237 and 240 (a) and under the Rules of Practice and Procedure now in force par-

ticularly Subdivision (b) of Section 38 [Revised Rules], the Bankruptcy Act and the rules concerning the same.

STATUTES INVOLVED.

The New York Personal Property Law, Sections 65 and 71; amendment of June 22, 1938, of the Bankruptcy Act [Chandler Act] (Sec. 70 (c) U. S. C. A., Title 11, Sec. 110 (c)); adding: "whether or not such creditor exists."

Article V in Addition to, and Amendment of, the Constitution of the United States; the material portions of which are set forth in the appendix.

ERRORS TO BE URGED.

POINT I.

The Circuit Court of Appeals erred in deciding that the Bankruptcy Court had jurisdiction of petitioner, or the *res*, or to entertain the petition of the trustee dated August 27, 1940, and to grant an order thereon (of the same date) directing Irving J. White (and others) after the State Sheriff's levy, to show cause before the Referee why the relief now had should not be granted. White appeared specially and challenged (a) the power of the referee to make the order; (b) service on White's attorney and not personally on White; (c) any equity action or special proceeding by way of an order to show cause; (d) jurisdiction of White or of the property involved and (e) the constitutionality of the proceeding as not constituting due process under the law.

The order of reference had no connection whatever with this order to show cause; the reference was directed by the District Court on June 28th, 1940; the order of reference was not made until September 20, 1940, after the Trustee's attempt to obtain jurisdiction of White by his order to show cause of August 27, 1940, served only on White's attorney.

The alleged submission of White to this jurisdiction resulting in the order of reference is based solely on his application to modify the stay of proceedings and such other (incidental) relief as might be just. His assertion of jurisdiction in the State Court is called a "consent" to bankruptcy jurisdiction. Here the sequence of events is very important:

1940

June 19, Creditors' meeting and tentative acceptance of Pearlstein's offer to purchase, subject to White's contract.

20, White obtains order to show cause returnable June 21, why the stay of his pending action should not be vacated.

21, Receiver and creditors obtain adjournment of above White application to June *28th*; and

22, Order confirming the sale is entered WITHOUT NOTICE, though the offer gave to 5 P. M. June 28th to close.

24, Pearlstein transfers his purchase to the new corporation Manhattan Bakeries, Inc., subject &c.

28, (Adjourned date) White asks leave to withdraw his application because the sale is now confirmed and complete, still subject to his contract and foreclosure thereof, and the District Court has voluntarily parted with possession of the *res* which he must now pursue in the State Court as against the purchaser and his transferee.

This leave is denied and a reference is directed, based on this alleged submission of White to the jurisdiction of the District Court. White had the right to pursue the purchaser and his transferee without the District Court's permission. No stay protected them and the causes of action against them

arose after the sale. The District Court could aid him *only before* the sale was judicially confirmed.

To protect his property White brought suit in the State Court against Pearlstein on July 1, 1940, and brought in the Manhattan Bakeries, Inc., a week later, and both appeared and answered in that action. He here obtained temporary stays against further disposition of the property, and when they expired gave the statutory bond of $12,000. and the Sheriff levied replevin on August 24, 1940. Now, when Manhattan Bakeries, Inc., was about to lose the free use of this expensive equipment, the Trustee springs into action and obtains, on August 27, 1940, on his petition, an order from the Bankruptcy Referee, staying White and the Sheriff and directing White to show cause why he should not be expropriated. White appears specially and protests the jurisdiction. On September 4, 1940, months after they had appeared and answered in White's State Court action, Pearlstein and Manhattan Bakeries, Inc., file a limited appearance with the Referee, consenting to White's expropriation, but without prejudice to their rights in ANY forum, and on September 20, 1940, almost a month after the State Court replevin, the order of reference is entered. The hearing was held October 2, 1940, and White again appeared specially and protested the jurisdiction; the Referee's report rendered on November 18, 1940, and confirmed by the District Court on January 13, 1941. Of course, all of these steps "In Bankruptcy" were taken after August 24, 1940, when replevin was levied.

Only possession of the *res* could confer any jurisdiction on the District Court. *In Re Baldwin*, 291 U. S. 610; *Lion Co.* v. *Kraratz*, 262 U. S. 77, p. 88; *Metcalf* v. *Barker*, 187 U. S. 177.

POINT II.

The Circuit Court of Appeals erred in deciding that the District Court, sitting in bankruptcy or otherwise, had summary jurisdiction to determine the validity of White's con-

tract, without having the actual or constructive possession of the *res*.

Its opinion creates the ghost of an "interest" in a lien which had passed, with the sale, and with the transfer of the goods. It says "the order whereby the 'lien is preserved for the benefit of the estate' * * * is somewhat misleading but serves as a sufficient description of the interest retained by the Trustee. Speaking accurately (*sic*), what is preserved is not the lien of White but an interest in the chattels equivalent thereto which the bankruptcy COURT never sold." What in the name of law is this imaginary interest? The concurring opinion is based on the theory that the "sale contract" (presumably that of the Bankruptcy Court to Pearlstein) is "the product of mutual mistake". No suit or application, in any way, to correct or modify THAT contract was ever instituted!

First Na. Bank v. *Chicago Co.*, 198 U. S. 280.

And by the same Circuit Court on almost identical facts. *In Re Rothschild*, 154 Fed. 194, 18 A. B. 682. Another case "on all fours" is *In Re Bluestone*, 174 Fed. 53.

Summary proceedings are ably defined *In Re Ballou*, 215 Fed. 810. That White did not abandon his claim did not amount to a consent to an exercise of jurisdiction, which he protested. *Louisville Co.* v. *Comingor*, 184 U. S. 18.

POINT III.

The question as to the validity of the refiling of White's contract could be raised only by a creditor having "by attachment or levy a lien" WITHOUT NOTICE. *Holt* v. *Crucible Co.*, 224 U. S. 262, 32 S. Ct. 414. Here the bankrupt had been through a reorganization proceeding in 1938 and the whole baking industry knew the actual conditions. No attempt to prove or offer of proof was made regarding the existence of a single creditor WITHOUT NOTICE. *U. S.* v. *Grogg*, 9 F.

(2) 424. This burden of proof was on the trustee. *In Re Pointer Brewing Co.*, 105 F. (2) 478; *In Re Douglas Lumber Co.*, 2 F. (2) 985, 3 A. B. R. ns 67. The Second Circuit held otherwise *In Re Master Knitting Corp.*, 7 F. (2) 11, where Hon. Learned Hand dissented, with an opinion citing the *Douglas* case (*supra*) and his dissenting opinion agrees with the law in New York State. *American Co.* v. *Najarian*, 195 N. Y. Supp. 555, 119 Misc. 219, citing *Seymour* v. *McKinstry*, 106 N. Y. 230. McKinney's Consol. Laws Vol. 40 (Pres. Prop. Law), p. 256, Sec. 65, note 9 citing *Craine Co.* v. *Alden Bank*, 218 App. Div. 263, 218 N. Y. Supp. 143; *N. Y. Title Co.* v. *Grossman, Inc.*, 142 Misc. 274, 253 N. Y. Supp. 533 affd. (no opinion) 236 App. Div. 665, 257 N. Y. Supp. 1031 and many others.

"Whether or not such creditor actually exists" was added by the Chandler Act in 1938, more than a year after White's contract was made and a year after it was actually in permanent default. The Act has been held not to be retroactive. *Ginsberg* v. *Lindel*, 107 F. (2) 721; (Nov. '39, C. C. A., 8) citing 209 U. S. 306, 314; 28 S. Ct. 537; 52 L. Ed. 804; *Holt* v. *Henley*, 232 U. S. 637.

POINT IV.

The Court below erred in undertaking to preserve to the Trustee "not the lien of White but an interest in the chattels equivalent thereto which the bankruptcy court never sold." What is this ghost of an "interest"? The sale was actually subject to White's contract and its foreclosure. The concurring opinion describes the situation as one of "mutual mistake" while mistake, if any, was not of a fact but a mistake of law and there was nothing "mutual" about it.

No order was obtained to permit a sale free and clear of encumbrances (so that claims might attach to the proceeds) or was an order made preserving the lien to the Trustee, because White's contract was considered valid, as it was in fact. *In Re Muhlhauser*, 121 Fed. 669 (C. C. A., 6).

The minutes of the sale show the Receiver's and petitioning Creditors' attorney saying: "There is a conditional bill of sale under foreclosure by I. J. White of $11,000." *i. e.*, $9,400. and interest. Mr. Midler (purchaser's attorney) "there are 18 or 19 trucks * * *. Other than that practically all the equipment in the place is subject to the I. J. White mortgage" and again the Receiver's attorney: "There are very few new creditors, * * * Most * * * appeared in the re-organization proceeding and if they do not know what the assets are certainly no one would know." White has been in the bakers' machinery business for many years; he installed this equipment at his substantial cost and forebore foreclosure for 32 months after default. Shall his indulgence cost him ten thousand dollars? He was a business man acting in good faith without lawyers. *In Re Sexton*, 225 U. S. 96; *S. & S. Gold Mines* v. *Seymour*, 153 U. S. 509.

Besides, the purchaser was entitled to know who would hold his obligation; whether White or the Trustee. But, of course, if the Trustee thought he had any such right as is now asserted, it would have been his duty to sell "free and clear" and not subject to White's contract *and* its pending foreclosure.

POINT V.

The Court below erred in that the bankrupt had no leviable interest in the chattels under New York law and, therefore, none the Trustee could acquire. Bankruptcy Act (Title 11, U. S. Code, Sec. 110 (5)). The law of the State is the law in bankruptcy. *Thompson* v. *Fairbanks*, 196 U. S. 516. Bankrupt had no leviable interest. *Baker* v. *Hill*, 250 N. Y. 484; *Whitney* v. *Biggs*, 156 N. Y. Supp. 1107, 62 Misc. 424; *Edwards* v. *Walker*, 293 N. Y. Supp. 1007, 162 Misc. 96 (Supp., p. 1010); *C. I. T. Co.* v. *Miklow*, 282 N. Y. Supp. 447, 157 Misc. 120. A state assignee for the benefit of creditors is not a creditor with a lien acquired by attachment or levy. *In Re Pelligrini*, 290 N. Y. Supp. 774, 248 App. Div.

526 (2nd Dept.), citing *Kane Co.* v. *Kinney,* 174 N. Y. 69; *Creamery Co.* v. *Horton,* 165 N. Y. Supp. 257, 178 App. Div. 467, approved and followed *In Re Lloyd Co.,* 11 Supp. (2) 223, 256 App. Div. 965 (mem.).

If valid against the state assignee it is valid against the Trustee. *Humphrey* v. *Tatman,* 198 U. S. 91; *Hewitt* v. *Berlin Wks.,* 194 U. S. 296, citing *In Re Economical Printing Co.,* 110 Fed. 514, in which authorities are discussed, including *Sheldon* v. *Wickham,* 161 N. Y. 500.

The right to lien was lost if not taken before bankruptcy. *Detroit Trust Co.* v. *Pontiac Bank,* 237 U. S. 196; *Holt* v. *Crucible Co.,* 224 U. S. 252 (*supra*). The Trustee takes subject to liens valid against the creditors *whom he represents. In Re Border Bank* v. *Coupland,* 240 Fed. 365 (C. C. A., 5); *In Re Dagwell,* 263 Fed. 406; *In Re West Side Auto Co.,* 279 Fed. 301. Sections 67 and 70 of the Bankruptcy Act provide only for subrogation regarding liens acquired by LEGAL action and, in this case, there is neither reason for, nor right to, subrogation.

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT.

1. The District Court parted with jurisdiction when it parted with the *res;* it had jurisdiction of neither the person of petitioner nor of the *res* in this proceeding.

2. The State Supreme Court has exclusive jurisdiction of the parties and possession of and sole jurisdiction over the *res* where the Trustee may interplead and assert his claim.

3. This summary proceeding is without legal basis and there is no authority for subrogation in this case.

4. Bankrupt had no leviable interest in the *res* and therefore the Trustee could acquire none.

5. The judicial confirmation of the sale is *res adjudicata* as to the validity of the White contract.

6. The amendment, set forth, of the Chandler Act is not retroactive.

7. The burden of proving want of actual notice on the part of any creditor, of White's contract, was on the Trustee.

8. Conditional contracts raise questions of *title;* not of lien.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the fundamental questions involved on this appeal are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Dated, July 21st, 1941.

JOHN P. McGRATH,
Counsel for Petitioner,
appearing specially.

APPENDIX.

NOTICE OF SALE by Referee, dated June 11, 1940.

Creditors are hereby notified of a meeting before the undersigned Referee on Wednesday, June 19th, 1940, at 2 P. M. at * * * to consider the offer of $7,500. made by Nathan Pearlstein for the Receiver's right, title and interest in and to all property, assets and effects of the bankrupt estate, free and clear of any attachments, judgments, Federal, State and City taxes and claims of creditors, but subject to mortgages, conditional bills of sale and foreclosure proceedings thereof and real estate taxes and assessments affecting said real and personal property; or to consider any other or better offer that may be made at said meeting.

OFFER OF NATHAN PEARLSTEIN, dated June 6, 1940.

Mr. Joseph O'Connor, as Receiver of
Manhattan Steam Bakery, Inc.,
and/or his successor.

Dear Sir:

I offer to purchase all of the machinery, equipment, automobiles, furniture and fixtures, stock, accounts receivable and equities therein, books and records of account, routes, good-will, trade names, real estate and improvements thereon known as * * *

2. That all of said assets are to be purchased free and clear of any attachments, judgments, Federal, State and City taxes and claims of creditors, but subject to mortgages, conditional bills of sale and foreclosure proceedings thereof, and real estate taxes and assessments affecting the real and personal property.

3. That if this offer is approved and accepted, the business and assets will be taken over as of June 4, 1940, at 9 A. M. * * *

5. The sale is to be approved by a Referee in Bankruptcy or Judge of the United States District Court for the Eastern District of New York in a proper proceeding brought therefor, and upon such approval, this offer is to be deemed accepted.

6. As time is of the essence, this offer to purchase must be accepted and approved of not later than June 28, 1940 at 5 P. M.

* * * * *

NEW YORK PERSONAL PROPERTY LAW.

Section 65. CONDITIONAL SALES AS TO CERTAIN PERSONS. Every provision in a conditional sale reserving property in the seller shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided.

Section 71. The filing * * * shall be valid for a period of three years only. * * * The validity of the filing may in each case be extended for successive periods of one year from the date of refiling by filing * * * a copy * * * within thirty days next preceding the expiration of each period.

CHANDLER ACT.

Added to Section 70 (c) Title 11, U. S. Code, referring to "LIEN" creditors, the words: "Whether or not such a creditor exists." June 22nd, 1938.

AMENDMENTS TO THE CONSTITUTION.

Article V. "No person shall be * * * deprived of * * * property, without due process of law; * * *."

No. 539

SEP 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

In the Matter

of

MANHATTAN STEAM BAKERY, INC.,
Bankrupt,

IRVING J. WHITE, appearing specially,
Petitioner,

IRVING STEINMAN, as Trustee, NATHAN PEARLSTEIN, and MANHATTAN BAKERIES, INC.,
Respondents.

BRIEF OF RESPONDENT-TRUSTEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HARRY H. SCHUTTE,
Counsel for Respondent,
Irving Steinman,
as Trustee.

LOUIS P. ROSENBERG,
Of Counsel.

THE COURT PRESS, N. Y. C.

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IRVING STEINMAN, as Trustee, NATHAN PEARLSTEIN, and MANHATTAN BAKERIES, INC.,

Respondents.

BRIEF OF RESPONDENT-TRUSTEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Circuit Court unanimously affirmed the order of the District Court rendering null and void the petitioner's conditional bill of sale by reason of the failure to comply with the provisions of Section 71 of the Personal Property Law of the State of New York.

The Facts.

The opinion of Judge Augustus N. Hand gives a succinct and accurate statement of the facts, which will not be here repeated.

The Issue.

The record below presented for review the following questions of law:

1. Did the Court have jurisdiction to summarily determine the controversy existing between the parties.

2. Was the conditional sales agreement properly declared invalid as against the trustee in bankruptcy.

No constitutional question is involved, but merely the interpretation of the requirements of the provision of Section 71 of the Personal Property Law of the State of New York.

POINTS.

I.

There is no necessity for a review by this tribunal. No constitutional question is involved and there is no conflict, as is claimed, among any of the circuits on the question here involved.

This case involves merely the application of Section 70(c) of the Bankruptcy Act (11 U. S. C. A., Title 11, §110(c)), which is a continuance of the very same provisions formerly embodied in Section 47 (a)(2) of the Bankruptcy Act as existed prior to September, 1938. Prior to the amendment of the Bankruptcy Act, a trustee could properly question the validity of an instrument for failure to comply with the filing requirements and was vested with all

the rights, remedies and powers of a creditor then holding a lien thereon by legal or equitable proceedings (*In re Active Wet Wash Laundry Co.* (D. C., N. Y.), 8 F. Supp. 966 (affirmed in C. C. A., 2nd Cir.), 73 F. (2d) 990); (*In re Master's Knitting Corp.* (C. C. A., 2nd Cir.), 7 F. (2d) 11; *In re Fairbanks* v. *Wills*, 240 U. S. 642) and that remedy was continued by the amendment of the Bankruptcy Act. The opinion of Judge Hand recognizes this fact, for he says:

> "It is argued that the foregoing provisions of the Chandler Act do not apply because they were enacted in 1938 after the conditional bill of sale was made. They, however, did no more than afford a remedy to a trustee in bankruptcy. We can see no possible basis for a claim that they unlawfully divested property rights. Indeed, the words 'whether or not such creditor actually exists', which were added by section 70(c) of the Chandler Act to section 47(a)(2) (11 U. S. C. A., §75(a)(2)) of the former Bankruptcy Act, as it had stood since the Amendment of 1910, gave the trustee no more than the 'remedies * * * of a creditor holding a lien by legal or equitable process' *which already were open to him under section 47.* In the present case the chattels could have been reached by an execution creditor since the title of the conditional vendor was invalid because the conditional bill of sale was not refiled in accordance with the statute. Accordingly the rights of the trustee as representative of the creditors must prevail over the invalid lien of the conditional vendor. (*In re Active Wet Wash Laundry Co.* (D. C., N. Y.), 8 F. Supp. 966 (affirmed in (C. C. A., 2nd Cir.), 73 F. (2d) 990);

In re Duker Ave. Meat Market (C. C. A., 6th Cir.), 2 F. (2d) 699; *cf. Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268."

There has been no retroactive application of Section 70 (c) of the Bankruptcy Act. The conditional bill of sale was invalid under the previous provisions of Section 47(a)(2) (in *Re Kaufman*, 1 F. Supp. 368) and consequently is not in conflict with *Ginsberg* v. *Lindell*, 107 F. (2d) 721, referred to on page 7 of the petition for writ.

II.

The Court had jurisdiction to summarily determine the issues.

Not alone did the bankrupt have possession of the property at the time of the commencement of the bankruptcy proceedings, but the appellant submitted to the jurisdiction of the Court by making application to reclaim the chattels.

A. The Property Was in the Possession of the Bankrupt at the Time of the Commencement of the Bankruptcy Proceedings and Was Turned Over to the Receiver.

It is well settled that when a bankrupt has possession of the property at the time of the commencement of bankruptcy proceedings, such possession passes to the Court and vests it with jurisdiction to adjudicate in a summary proceeding all controversies and claims in connection therewith (*Isaac* v. *Hobbs Tie & Timber*, 282 U. S. 734; *Lockhart* v. *Garden City Bank & Trust Co.*, 116 F. (2d) 658; *Irving Trust Co.* v. *Fleming*, 73 F. (2d) 423; *In re Weing*, 104 F. (2d) 112).

The chattels were in the possession of the bankrupt at the time of the commencement of bankruptcy proceedings and were turned over to the Receiver in Bankruptcy upon his appointment and qualification. The conditional vendor was aware of this fact and subsequently made application to the District Court for an order modifying the injunctive provisions of its order dated June 3, 1940 so as to permit him to reclaim the chattels and to continue the replevin suit. The Receiver opposed this application and counterclaimed for affirmative relief praying for a decree that the said conditional sales agreement was invalid. The Court had jurisdiction to entertain both applications.

The test is—was the property in the bankrupt's possession at the time of the commencement of bankruptcy proceedings. If it was—jurisdiction was proper and extends to the determination of controversies relating to such property (*In re Tax Service Assn. of Ill.* (U. S. Supreme Court), 59 S. Ct. 131).

B. The Petitioner Invoked the Aid of the Court and Thereby Submitted to the Jurisdiction of the Court.

The petitioner invoked the aid of the District Court and submitted himself to the jurisdiction of that Court for a determination of the question as to whether he was entitled to the lawful possession of the property referred to in his conditional sales agreement. The order of the District Court dated June 3, 1940 appointed the Receiver and stayed all persons from continuing any proceedings which had for its purpose the removal of any of the bankrupt's property. The petitioner, by order to show cause dated June 20, 1940, made application to modify the injunc-

tion and for permission to reclaim the chattels and to continue the replevin action. The Receiver opposed this application and counterclaimed for affirmative relief, praying for a decree that the said conditional sales agreement was invalid. This answer and counterclaim was served upon the petitioner's attorney, who subsequently sought to withdraw his motion to modify the injunction. This request was opposed and facts presented to the Court, demonstrating the vulnerability of the petitioner's lien. The Court thereupon refused to permit the withdrawal and referred the issues to a Referee for determination. This was a proper exercise of the Court's discretion. Rule 41(2) of the Rules of Civil Procedure, effective September 20, 1938, reads:

> "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deemed proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, *the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.* * * *"

This rule is applicable to proceedings in bankruptcy. General Order XXXVII promulgated by the United States Supreme Court reads as follows:

> "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be."

(See *Zydney* v. *New York Credit Men's Association* (C. C. A., 2nd Cir.), 113 F. (2d) 986).

The petitioner's request to withdraw was properly denied where such withdrawal might have deprived the Receiver and trustee of the right to have determined in a summary proceeding the issue of whether or not the lien of the said conditional sales agreement was valid or invalid. In view of the counterclaim, the petitioner had no absolute right to withdraw his application (*In re Palmenberg* (C. C. A., 2nd Cir.), 76 F. (2d) 935; *In re Palmenberg*, 297 U. S. 230, 56 S. Ct. 451).

III.

The conditional sales agreement is invalid as against the trustee in bankruptcy.

The conditional sales agreement was filed on March 12, 1937 and refiled on March 28, 1940. Section 71 of the Personal Property Law of the State of New York provides that such refiling should be *within thirty days next preceding the expiration* of the first filing. Inasmuch as it was not a refiling as required by statute, it was nugatory and rendered said conditional sales agreement null and void as against the trustee in bankruptcy (*In re Kaufman*, 1 F. Supp. 368; *In re Active Wet Wash Laundry*, 87 F. Supp. 966, affd. C. C. A., 2nd Cir., 73 F. (2d) 990; *In re Steffens*, 31 F. (2d) 660; *In re Lukas*, 24 F. (2d) 254). A tardy or premature refiling invalidates the lien as against judgment creditors (*In re Kaufman, supra; In re Active Wet Wash Laundry, supra; In re Steffens, supra; In re Lukas, supra*).

The Receiver in Bankruptcy was in possession of the chattels. The conditional vendor made application to reclaim these chattels. The burden was upon him to establish the validity of the conditional sales agreement. The conditional sales agreement was not properly refiled and the burden was on the conditional vendor to prove that there were no creditors without notice (*In re Master's Knitting Corp.*, 7 F. (2d) 11; *In re Guild, Bloomfield & Jensen, Inc.*, 51 F. (2d) 818). This issue was not raised in the District Court, but for the first time in the Circuit Court. Petitioner neither presented nor offered to adduce proof to establish or support a finding that all creditors knew of the existence of the conditional sales agreement, nor could such fact be established in view of the existence of the many wage and tax claimants who, beyond any question, could not be charged with notice of the existence of the conditional sales agreement.

CONCLUSION.

It is respectfully submitted that the petitioner has shown no reason in law or in fact which would justify this Court in granting his petition for certiorari in this case, and that therefore, the petition should be dismissed.

Respectfully submitted,

HARRY H. SCHUTTE,
Counsel for Respondent,
Irving Steinman,
as Trustee.

LOUIS P. ROSENBERG,
Of Counsel.

No. 539

IN THE

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—of—

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Respondents.

PETITIONER'S REPLY BRIEF.

Inaccuracies in respondent's brief require this terse reply.

RESPONDENT'S BRIEF, POINT II.

(A) Possession of the RES was *not* in the Bankruptcy Court at the time of petitioner's special appearance, yet his assertion of *existing* jurisdiction in the State Court in a *pending* action is, anomalously, made the basis of an implied *consent* to Bankruptcy jurisdiction.

(B) *AFTER* petitioner's application to withdraw (Record, p. 27) because the RES had passed out of the Bankruptcy Court, the claim (now styled a counterclaim) was asserted (p. 29).

RESPONDENT'S POINT III.

(p. 8) The question as to the burden of proof of want of notice was, in fact, argued in petitioner's briefs, both before the Referee and the District Court, as well as the Circuit Court of Appeals, which held (erroneously as petitioner here again asserts) that the burden was on him and not on the respondent who seeks to benefit as an attaching creditor "without notice".

(Neither Nathan Pearlstein nor Manhattan Bakeries, Inc., appeared or filed briefs in the Circuit Court of Appeals.)

Dated, September 12th, 1941.

Respectfully submitted,

JOHN P. McGRATH,
Counsel for Petitioner,
appearing specially.